

Robert D. Wyatt, Esq.  
Eileen M. Nottoli, Esq.  
BEVERIDGE & DIAMOND  
One Sansome Street  
Suite No. 3400  
San Francisco, California 94104

Attorneys for Respondent  
Catalina Yachts, Inc.

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 HAWTHORNE STREET  
SAN FRANCISCO, CA 94105

In the matter of:	)	Docket No. EPCRA 09-94-0015
	)	
CATALINA YACHTS, INC.	)	OPPOSITION TO MOTION TO
	)	STRIKE OPPOSITION TO MOTION
	)	FOR ACCELERATED DECISION
	)	
	)	
	)	

Catalina Yachts, Inc. ("Catalina") responds to the United States Environmental Protection Agency Region 9's ("EPA") Motion to Strike Motion for Accelerated Decision as follows. Catalina also renews its request that the court either dismiss this action, determine liability with no civil penalty, or set a hearing as soon as possible to determine an appropriate civil penalty.

FACTS

On June 20, 1994, EPA filed a Complaint and Notice of Opportunity for Hearing ("Complaint") against Catalina for alleged failures to file a total of seven Form R reports for

1988-92. EPA sought the maximum penalty of \$25,000 for each alleged reporting violation for a total of \$175,000.

On July 14, 1994, Catalina filed its Answer to Civil Complaint ("Answer"). Catalina admitted that it used acetone and styrene during the relevant time period. However, Catalina answered that it was unable to respond to the remaining allegations of the Complaint at that time because Catalina had not finished reviewing its records. Accordingly, Catalina denied the remaining allegations and reserved the right to amend its Answer at a later date.

On October 4, 1994, EPA filed a Motion for Accelerated Decision based on EPA's contention that there were no material facts with respect to liability to be decided by a hearing.

Catalina filed its Opposition to Motion for Accelerated Decision on October 19, 1994 and requested that the court either dismiss this action, determine liability with no civil penalty, or set a hearing as soon as possible to determine an appropriate civil penalty. In its Opposition, Catalina conceded that no Form R reports had been filed but submitted copies of documents that had been filed with local government agencies that contained comparable information to that required in the Form R reports, and described public outreach programs conducted by Catalina in its community. Catalina was innovative in finding a substitute for acetone, a substance that was recently determined by EPA not to require

reporting under Section 313. Catalina's lack of awareness of an obligation to file Form R reports did not harm human health or the environment and was, at worst, an administrative error.

In an effort to move this case forward in an efficient and expedited matter, Catalina's Opposition also sought relief from the civil penalties, if any, for this administrative error. EPA has sought the maximum penalty of \$25,000 for each of the seven alleged violations for a total penalty of \$175,000. In doing so, Catalina's Opposition also referred to an informal settlement with EPA at which EPA staff stated that they were bound to adhere strictly to the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right to Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990)" (referred to herein as the "EPA Penalty Policy"). Consequently, EPA staff informed Catalina that, under the EPA Penalty Policy, the proposed penalty for each alleged violation was \$25,000 and that EPA staff had no discretion to further adjust the penalty beyond the 30% provided in the penalty policy.

EPA has now filed a Motion to Strike Opposition to Motion for Accelerated Decision ("Motion to Strike") on November 10, 1994. The Motion to Strike seeks to strike all portions of Catalina's Opposition to Motion for Accelerated Decision which refer to the EPA staff discussions on the limits of their discretion in settling cases and the requirement that they strictly adhere to the EPA penalty policy.

### ARGUMENT

EPA's Motion to Strike is inappropriate for the following reasons:

First, a Motion to Strike is an appropriate response to a pleading, Fed. Rule Civ. Proc. 12(f), and a pleading is a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third party complaint or a third party answer. Fed. Rule Civ. Proc. 7(a). EPA did not file a motion to strike a pleading; rather, it filed a motion to strike Catalina's brief in Opposition to Motion for Accelerated Decision, which is not a pleading. Consequently, EPA's Motion to Strike is not appropriate.

More importantly, EPA based its Motion to Strike references to EPA staff statements that they must strictly adhere to the EPA Penalty Policy, and cannot exercise discretion, upon Fed. Rule of Evidence 408 (referred to herein as "Rule 408"). Rule 408 provides that evidence of compromising or attempting to compromise a claim is not admissible to prove liability for or invalidity of the claim or the amount. Significantly, Rule 408 "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." Rule 408. See In the Matter of Western Compliance Services, Inc., TSCA Docket 1087-11-01-26 (February 10, 1989), 1989 WL 252617 (E.P.A.).

The statements by EPA staff that they are bound to strictly adhere to the EPA Penalty Policy and cannot exercise discretion are used in Catalina's Opposition to Motion for Accelerated Decision and were not offered to prove a compromise of a claim. Rather, they were offered to prove that the EPA Penalty Policy is being treated by EPA staff as a binding rule of substantive law. However, under the rule set forth in McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C.Cir., 1988), in order to obtain the status asserted by EPA staff the Penalty Policy must comply with the notice and comment requirements of the Administrative Procedures Act ("APA"), 5 U.S.C. § 553. This the agency has not done. The EPA Penalty Policy was not published in the Federal Register for notice and comment and subsequent adoption in accordance with the APA. Consequently, the EPA Penalty Policy is not binding on this court, but is merely advisory of the agency's position. Given this impasse, Catalina has sought through its Opposition to obtain relief from this court. Although Catalina might have fashioned its request in a different form, in Catalina's view the question is one of form over substance, and Catalina herein requests that the court grant appropriate relief.

#### RELIEF REQUESTED

Based on the above, Catalina requests that the court deny EPA's Motion to Strike. Under the facts as set forth in its Opposition to Motion for Accelerated Decision, Catalina renews its request that the court either dismiss this action,

determine liability with an award of no civil penalty, or set a hearing as soon as possible to determine the appropriate civil penalty based on the evidence of Catalina's substantive compliance with the requirements to inform the community of Catalina's use of acetone and styrene and the absence of evidence of harm to human health or the environment.

DATE: December 2, 1994

BEVERIDGE & DIAMOND

By: Eileen M. Nottoli by RSW  
Eileen M. Nottoli  
Attorneys for  
CATALINA YACHTS, INC.

**CERTIFICATE OF SERVICE**

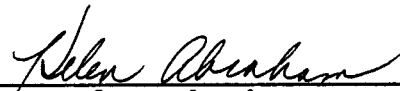
I hereby certify that the original copy of the foregoing Opposition to Motion to Strike Opposition to Motion for Accelerated Decision was filed with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9, and that a copy was sent by First Class Mail to:

Spencer T. Nissen  
Administrative Law Judge  
Office of Administrative Law Judges  
United States Environmental Protection Agency  
401 M Street, S.W., Room 3706 (A-110)  
Washington, D.C. 20460

and to:

David M. Jones, Esq.  
Office of Regional Counsel RC-2-1  
United States Environmental Protection Agency  
Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Date: December 2, 1994

  
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Helen Abraham